No 514

SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
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PETITION FOR WRIT OF CERTIORARI.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Commerce Title Guaranty Company, respectfully shows as grounds for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a suit—originally two suits, later consolidated—instituted in the District Court of the United States for the Western Division of the Western District of Tennessee, to recover a capital stock tax exacted under Section 105 of the Revenue Act of 1935 and Section 401 of the Revenue Act of 1936, for the years ending June 30, 1936, and June 30, 1937.

Petitioner, the taxpayer, sued on the ground that it was an insurance company and, therefore, exempt from the tax. The respondent maintained that petitioner was not an insurance company within the meaning of the Act because it derived part of its income from an abstract business and from rent on its home office building.

Petitioner, the taxpayer, was incorporated for the purpose of, was during the tax years in question, and is now engaged in conducting a title guaranty business formerly operated by the Bank of Commerce & Trust Company, of Memphis, Tennessee (hereinafter called the Bank).

The Bank, as a result of a depositors' run, went into voluntary liquidation (R. pp. 66, 69; Findings of Fact 10, R. p. 35).

In addition to its regular banking business the Bank for many years maintained, among other departments, a title department in which it issued policies insuring titles to purchasers and mortgagees of real estate (R. p. 66; Findings of Fact 21, 31, R. pp. 37, 39). In the latter type of policy it guaranteed that the title and mortgage lien were valid. It did not, however, insure the collectibility of the mortgage debt.

This title guaranty business of the Bank had been highly profitable (R. p. 66; Findings of Fact 22, 27, 28, R. pp. 37, 38) until as a result of the liquidation it practically ceased, but the good will of this business and the competent title organization were distinct assets which it was desirable to preserve.

As a necessary adjunct to its title business the Bank owned an abstract company, which made and sold abstracts of title to real estate (R. pp. 146, 147, 154; Findings of Fact 26, 33, R. pp. 38, 41).

In order for a policy of title insurance to be issued the

purchaser must have first obtained an abstract of title (R. p. 146) and, in normal years, 90 per cent of the abstracts compiled by the abstract company were used as bases for the issuance of title insurance policies by the Bank (R. pp. 132, 133; Findings of Fact 26, R. p. 38).

Since the voluntary liquidation of the Bank made its title policies unsalable, it was obvious that if the assets and good will of the title business were to be preserved that business must be separated from the Bank. Hence the incorporation of the petitioner, which was formed for the sole purpose of carrying on the title guaranty business of the Bank.

It was necessary for the petitioner to have assets sufficient to assure those to whom title policies were issued that these policies represented a collectible guaranty. For this reason the Bank, from its assets, transferred and conveyed to petitioner (1) the authorized capital stock ($100,000.00) of the abstract company, (2) all of the title guaranty records formerly owned by the Bank and (3) a fifteen-story office building owned by the Bank (R. pp. 34, 78, 85; Findings of Fact 6, 7, R. p. 34). Petitioner located its office in this building, occupying the greater part of the second floor, and planned to use the building as an advertising feature on its stationery and in other ways (R. pp. 72, 73, 76, 77, 97; Findings of Fact 34, 35, R. p. 41).

The capital structure of petitioner was $1,000,000.00 equally divided into common and preferred stock and $500,000.00 5 per cent bonds, secured by a first mortgage on this office building (R. p. 37; Findings of Fact 5, R. p. 33). The Bank received all of this stock and these bonds as a consideration for its transfer of the above-mentioned assets to petitioner.

It was necessary to obtain the consent of Reconstruction Finance Corporation to this transaction because the

office building, along with the other assets of the Bank, was under a mortgage lien to that organization to secure a loan of $12,000,000.00, of which $3,500,000.00 was a first lien on the office building (R. pp. 77, 118; Findings of Fact 13, 14, 20, R. pp. 35, 37). The officials of the Reconstruction Finance Corporation were convinced of the soundness of the proposed insurance company, consented to the subordination and release of its lien on the office building and even urged that that building be included in petitioner's assets (R. pp. 72, 73, 75, 118, 119; Findings of Fact 20, R. p. 37).

When the title guaranty business was conducted by the Bank the policies which it issued were backed by its entire assets, including this office building, and also including capital, surplus and undivided profits of more than $5,000,000.00 (R. p. 77, Exs. 3-7).

Petitioner during the tax years in question carried on the title guaranty business, treating the abstract business as an adjunct to it (all of the assets of the abstract company being finally transferred to the petitioner in consideration of the surrender of the capital stock of the abstract company), but in no instance did it guarantee the collectibility of a mortgage debt.

The assets of petitioner were not only not excessive as a "back-log" for its policies, but were hardly sufficient, as some of the old customers of the title department of the Bank refused to return as customers of the petitioner until it succeeded in reducing its bonded indebtedness below the original $500,000.00 (R. pp. 75, 84; Findings of Fact 41, R. p. 42). This bonded indebtedness was reduced to $160,000.00 (R. pp. 75, 85, 119; Findings of Fact 40, R. p. 42).

Petitioner issued in excess of $20,000,000.00 of title insurance between its incorporation in 1934 and the close of the calendar year 1937, and in excess of $36,000,000.00 up

to the last day of February, 1940 (R. p. 78, Ex. 13; Findings of Fact 37, R. p. 41). A number of policies were issued by petitioner with a face value in excess of $100,000.00 each (R. p. 155, Ex. 30; Findings of Fact 39, R. p. 42).

During the tax years in question the petitioner received gross income from various sources as follows:

	1935	1936	1937
Title Department....	$ 41,634.57 (24.63%)	$ 66,946.52 (28.89%)	$ 42,429.14 (18.15%)
Abstract Department	None	$ 30,043.86 (12.96%)	$ 55,364.40 (23.61%)
Office Building.....	$127,433.63 (75.37%)	$134,771.10 (58.15%)	$136,576.67 (58.24%)

(R. pp. 39-40; Findings of Fact 32, R. p. 39.)

But these figures are based upon gross receipts, and the operation of the office building resulted in a net loss for 1936 and 1937 (Findings of Fact 44, R. p. 43). So the income from the title guaranty business represents a far greater percentage of the net income than these figures indicate. Petitioner not only absorbed the losses on its office building with its premium income, but was enabled from the same source to show a profit on its entire business.

During this period the petitioner paid taxes to the State of Tennessee and to the County of Shelby and the City of Memphis as an insurance company (Findings of Fact 42, R. p. 43). Considering that its status was the same under the federal taxing authority, the petitioner claimed an exemption from the capital stock tax in filing its return for the year ending June 30, 1936, with the Collector of Internal Revenue (R. p. 6) and similarly for the year ending June 30, 1937 (R. pp. 17, 18). Both of these exemptions were disallowed (R. pp. 10, 22). Petitioner there-

upon paid the tax as assessed (R. pp. 6, 18) and filed claims for its refund (R. pp. 12, 13, 14, 23, 24, 25). These claims were disallowed and the present suit was brought to recover the amount of the tax which petitioner maintains was wrongfully collected.

The District Court, in an opinion reported in 32 Fed. Sup. 73, denied petitioner recovery (R. p. 45).

DECISION OF CIRCUIT COURT OF APPEALS AND DATE THEREOF.

The Circuit Court of Appeals affirmed, without opinion, on the 6th day of June, 1941, expressly adopting as its own "the reasons set forth in the opinion of the District Court" (R. p. 169).

B.

STATUTES INVOLVED.

Section 105 of the Revenue Act of 1935:

"Sec. 105. Capital Stock Tax.

"(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

"(c) The taxes imposed by this section shall not apply—

"(1) to any corporation enumerated in section 101 of the Revenue Act of 1934, as amended;

"(2) to any insurance company subject to the tax imposed by sections 201, 204 or 207 of such Act (1934) as amended."

Section 204 of the Revenue Act of 1934:

"(a) **Imposition of Tax.**—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company 13¾ per centum of the amount of its net income in excess of the credit provided in subsection (f) of this section, * * *.

"(b) **Definition of Income, etc.**—In the case of an insurance company subject to the tax imposed by this section—

"(1) **Gross Income**—'Gross income' means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, * * *.

"(3) **Investment Income**—'Investment income' means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows: * * *"

Section 401 of the Revenue Act of 1936 amended Section 105 of the 1935 Act by changing the rate of tax from $1.40 per $1,000.00 to $1.00 per $1,000.00 of the adjusted declared value and by changing the reference in Subsection (c) to the 1936 Act rather than to the 1934 Act.

Section 204 of the Revenue Act of 1936 is substantially the same as Section 204 of the Revenue Act of 1934.

C.

JURISDICTIONAL STATEMENT.

The Circuit Court of Appeals, in affirming, without opinion, on June 6, 1941, and adopting as its own the opinion of the District Judge, has decided an important question

of Federal law in a way in conflict with the applicable decisions of this court, in that this court, in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, held that the true test of whether a corporation was an insurance company within the meaning of the statutes here involved depended upon "the character of the business actually done in the tax years" (285 U. S. 188), whereas the Circuit Court of Appeals, in adopting the holding and opinion of the District Judge, in effect held that the question depended entirely upon the source from which the greater part of the gross income of the taxpayer was derived.

The statutory provision believed to sustain the jurisdiction is Section 340-A of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Section 340, U. S. C. A.).

D.

QUESTION PRESENTED.

The sole question presented is whether or not a taxpayer whose business has every characteristic of an insurance company is to be denied that classification under the Revenue Acts above set out and quoted for the sole reason that a major portion of its **gross** corporate income was derived from "investment income" instead of underwriting premiums.

E.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this court.

In **Bowers v. Lawyers Mortgage Co.**, 285 U. S. 182, and in **United States of America v. Home Title Insurance Company**, 285 U. S. 191, this Court held that the test of whether a taxpayer was an insurance company under acts identical with those here involved depended upon "the character of the business actually done in the tax years" (285 U. S. 188), and that the percentage of gross income received from premiums and other sources was merely one element to be considered in determining the character of the business actually done.

The District Judge found as a fact that the business of petitioner had every characteristic of an insurance company, but in a published opinion (32 Fed. Sup. 73) held that petitioner was not entitled to that classification because the rule was absolute that it was not entitled to such classification unless the greater portion of its income was derived from **premiums** and that when more than 50 per cent of its income was derived from "investment income" it could not be so classified. While the Circuit Court of Appeals did not file an opinion, the case was "affirmed upon the grounds and for the reasons set forth in the opinion of the District Court" (R. p. 169).

Thus the Circuit Court of Appeals, by reference, adopted as its opinion the opinion of the District Judge. The effect is, therefore, that this Court has announced that the test is the character of the business done when all circumstances are taken into consideration, while the Circuit Court of Appeals has departed from this test and adopted as the absolute and unyielding test the amount of premium income. Moreover, this Court, in analyzing the taxpayer's income, treated as insurance income "investment income," while the Circuit Court of Appeals treated "investment income" as noninsurance income, dissentitling petitioner to be treated as an insurance company. It has, therefore,

departed from the rule adopted by this Court, and for this reason the petition should be granted, regardless of whether the result reached by the Circuit Court of Appeals was right or wrong. Otherwise the effect will be not merely an incorrect decision in the instant case, but the announcement of a general rule which is incorrect in the light of the decisions of this Court, and which, unless corrected by this Court, will be applied generally in other cases.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, the full and complete transcript of the record and of the proceedings in the case numbered and entitled on its docket, "Consolidated Cases, Commerce Title Guaranty Company v. United States of America, Nos. 8644 and 8645," and that said judgment in the Circuit Court of Appeals for the Sixth Circuit may be reviewed by this Honorable Court, and for such further relief as this Honorable Court may deem proper.

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SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF GROUNDS OF JURISDICTION.

Jurisdiction exists because the Circuit Court of Appeals for the Sixth Circuit decided a question of Federal law in a way in conflict with applicable decisions of this Court by holding that under Section 105 of the Revenue Act of 1935 and Section 401 of the Revenue Act of 1936 the taxpayer could not be classified as an insurance company, even though it possessed every characteristic of an insurance company, unless the major portion of its income was derived from premiums, this being in conflict with decisions of this Court in **United States of America v. Home Title Insurance Company**, 285 U. S. 191, and **Bowers v. Lawyers Mortgage Co.**, 285 U. S. 182, which cases adopted the test of the character of business actually done.

Review is sought by certiorari under Section 340-A of the Judicial Code, as amended by the Act of February 13, 1925, and in accordance with Rule 38 of this Court.

STATEMENT OF CASE.

For purposes of concision petitioner adopts as its Statement of the Case the statement in its Petition for Certiorari entitled "Summary Statement of the Matter Involved," and incorporates same herein by reference.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals was in error in holding, in effect, that in no case is a taxpayer entitled to classification as an insurance company unless the greater portion of its income came from premiums, and regardless of the fact that it possessed every characteristic of an insurance company, and that the greater part of its income came from premiums and investment income appropriate to an insurance company.

ARGUMENT.

If the Circuit Court of Appeals held that petitioner's active business was that of an insurance company, and that the major portion of its income was derived from premiums and investment income, but that it could not be classified as an insurance company under the Revenue Act, because the major portion of its income did not come exclusively from premiums, and if this Court has held that where the business of a taxpayer possesses the characteristics of an insurance company, and the major portion of its income is derived from sources appropriate to an insurance business, then it is entitled to classification as an insurance company, petitioner should be granted certiorari. This is true, because in this event the Circuit Court of Appeals would have adopted a test as to what is an insurance company different from and at variance with the test sanctioned by this Court.

We shall, therefore, confine our brief to dealing with the two propositions:

1. The test adopted by the Circuit Court of Appeals for the Sixth Circuit;

2. The test adopted by this Court.

The Circuit Court of Appeals Found That Petitioner Possessed Every Characteristic of an Insurance Company, and That the Major Portion of Its Income Was Derived From Premiums Plus Investment Income, But Notwithstanding This, Held, as a Matter of Law, It Was Not Entitled to Classification as an Insurance Company, Because the Major Portion of Its Income Was Not Derived From Premiums.

Either this heading is an accurate statement of the holding of the Circuit Court of Appeals and its reasons for that holding, or its action in adopting as its own the find-

ings of fact and conclusions of law and opinion of the District Court, sanctions a classic example of a non sequitur. This is true because the effect of the opinion is either to say:

All the facts indicate that the taxpayer was doing an insurance business; therefore, as a matter of law, it is not an insurance company,

Or, to say:

While all of the facts indicate that the taxpayer was doing an insurance business, yet it cannot be classified as an insurance company under the Revenue Act for the sole reason that the major portion of its gross income was not derived from premiums.

The latter, of course, is what the Court did hold, as we shall point out.

In dealing with the characteristics of the petitioner's business it is not necessary to go beyond the Findings of Fact. This is not a case where there is any insistence that there should have been different findings of fact under the record. It is a case where every finding of fact was in accordance with petitioner's contention and where the error lies in the conclusion of law drawn from these findings of fact. It would be difficult for any intelligent non-lawyer to read the District Court's Findings of Fact and not be led by them to the irresistible conclusion that petitioner was an insurance company.

The findings of the Court on this are not merely general and suggestive. The Court expressly found the elements that go to make an insurance company:

That petitioner was incorporated for the purpose of doing a title guaranty business; that its capital structure was appropriate for that purpose; that the office building was a desirable asset as a sanction to its policies; that in

receiving this asset it had not created an excessive investment, but one that was barely sufficient, inasmuch as some prospective policyholders declined to accept its policies until the mortgage on the building was reduced; that the abstract plant was a valuable adjunct to the operation of a title guaranty business and one commonly possessed by a title guaranty company; that from the date of its organization to the end of February, 1940, petitioner issued title guaranty policies on real estate aggregating more than $36,000,000.00 and collected premiums from policies from March 1, 1934, to December 31, 1937, of more than $132,000.00; that petitioner paid taxes to the State of Tennessee as an insurance company; that, with negligible exceptions, its entire income came from the abstract department, premiums on policies and rents from the office building; that its title guaranty business was strictly insurance business in that it guaranteed the title to real estate to purchasers and to mortgagees, but in no instance guaranteed the collectibility of the mortgage debt; that its net income, with trivial exceptions, was derived entirely from premiums and from the abstract department because the office building was operated at a loss; that petitioner's active business was the insurance business and that its handling of the office building was merely the routine handling of an investment; that petitioner would never have been organized for the purpose of handling the office building, but that this was merely selected as a most desirable asset to be used incidentally and in connection with the insurance business, both because of its intrinsic and its advertising value.

Findings of Fact, R. pp. 32-43.

Thus factually the Court finds that the elements are so mixed in petitioner that one would say: It is an insurance company. If told that despite these facts the conclusion of the Court was that the petitioner was not an insurance

company, the irresistible inference would be that this was the result of some binding rule of law negativing that classification for it.

This, however, is not left to inference, for the District Court expressly predicated this conclusion upon its statement that "the significant and compelling facts are that in 1937 the gross earnings of petitioner from its title department were only 18.15 per cent of its total earnings as compared with 23.61 per cent from its abstract department and 58.24 per cent from rentals from space in its office building," etc. (R. p. 54).

The Court further found these facts to be "significant and compelling" because it was of opinion that this Court had held in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, that no taxpayer could be entitled to that classification unless the major portion of its gross income was derived from premiums.

If, therefore, this Court did not so hold in these cases, but, on the contrary, did, in effect, hold that where the active business actually done was insurance business, the taxpayer would be entitled to that classification, then clearly the Circuit Court of Appeals not only adopted an incorrect rule in this case, but reached an incorrect result, because that rule was the only possible reason that could have been advanced for denying petitioner the classification of an insurance company.

The Effect of the Opinions of This Court in Bowers v. Lawyers Mortgage Company, 285 U. S. 182, and United States of America v. Home Title Insurance Company, 285 U. S. 191, Is That a Taxpayer Is Entitled to a Classification as an Insurance Company Where That Is the Business Actively Done and Where the Major Portion of Its Income Is Derived From Premiums Plus Income From Proper Investments.

The only general rule enounced by the Court in either of these cases was in **Bowers v. Lawyers Mortgage Company**, supra, wherein it was said:

> "While name, charter powers and subjection to state insurance laws have significance as to the business which a corporation is authorized and intends to carry on, the character of the business actually done in the tax years determines whether it was taxable as an insurance company" (285 U. S. 188).

The application by the Court of this rule in the two cases, with the result that in the one the taxpayer was held not to be an insurance company and in the other to be such a company, sheds much light upon its true meaning.

In **Bowers v. Lawyers Mortgage Company**, supra, the taxpayer was incorporated under the law of New York, but its business could have been carried on by a corporation organized under the New York banking laws, as was the business of others engaged in the same line. The taxpayer never at any time insured titles. It received applications for loans, caused an appraisal of the property to be made, and had the title insured by an independent title insurance company. The borrower executed and delivered a bond and mortgage to the taxpayer and received the amount of the loan, less expenses, including the cost of the title insurance. Taxpayer sold the policy and mortgage and in connection with the sale issued a guaranty of the payment

of the principal sum upon maturity, plus interest at a rate less than that stipulated in the bond. It also obligated itself to keep the property and title insured. Its income came from lending fees, extension fees and interest collected between the date of the loan and its later sale and the difference between interest paid by the borrower and that guaranteed to the purchaser, which was termed "premiums." Under these circumstances the Court held that the lending of money on real estate, the sale of bonds and mortgages given by borrowers and the use of money received from purchasers to make additional loans, similarly secured, constituted its principal business (285 U. S. 188).

Characterizing this business, the Court said:

> "The lending fees, extension fees and accrued interest appertain to the business of lending money rather than to insurance and may not reasonably be attributed to the subordinate element of guaranty in respondent's mortgage loan business" (285 U. S. 189).

In analyzing the taxpayer's income a comparison was made between the premiums on the one hand and the aggregate received on the other from lending fees, extension fees and interest. Investment income did not enter into the decision of the case. The Court did point out that the act being considered defined gross income "to be 'investment income,' i. e., interest, dividends and rents, and 'underwriting income,' i. e., premiums earned, less losses and expenses."

Thus the Court apparently allocated investment income as strictly insurance income, but did not find it necessary to consider it, saying:

> "It is not shown that respondent had any investment income within that section" (285 U. S. 189).

The Court found both that the active business of the tax-

payer was lending money, and that the only income (there being no investment income) which could properly be considered as allocable to the insurance business was so-called premiums for guaranteeing collectibility, and that this was far less than the income derived from money lending. Consequently the taxpayer was held not to be an insurance company. Inferentially, the case is authority for our insistence that where the active business is insurance business, and where the major portion of the income is derived from premiums and investment income, the taxpayer is an insurance company. This follows because of the expression by the Court of the view that investment income properly pertains to the business of insurance rather than to that of lending money.

The taxpayer in **United States of America v. Home Title Insurance Company**, supra, was incorporated under the same laws and engaged in the same type of business as was that in **Bowers v. Lawyers Mortgage Company**, with one important difference: it guaranteed the titles to the real estate involved. The court allocated to the insurance business "the amounts received as compensation for insuring titles * * * the fees and charges for examination of titles, appraisals and other services incident to its insurance business," and from this allocation found that the total properly assignable to the insurance business was more than 75 per cent of all of the taxpayer's income.

This warrants allocation in the case at bar of the income derived from the abstract business to petitioner's insurance business.

The category in which investment income should be placed was not considered in **United States of America v. Home Title Insurance Company**, supra.

Distilled, the essence of these cases is:

Determinative is the question of the business in which

the taxpayer is actually engaged. In arriving at this its active business is to be considered and there is allocable to the insurance business investment income, abstract fees, appraisal fees, title examination fees and premiums for the issuance of policies. Income derived from money lending is not allocable to the insurance business.

Applying this test, petitioner is clearly an insurance company. That was the purpose of its incorporation. That was its active business. That engrossed the efforts of its executives. The abstract company was merely an adjunct to it. The office building was an investment which would never have reached petitioner, except for the desire to use it incident to the insurance business.

This conclusion is reinforced by the sources of petitioner's gross income. If investment income, as was held by this Court in the two cases mentioned, is allocable to the insurance business, then this, added to the income from the abstract business and premiums on title policies, constituted all but an infinitesimal portion of petitioner's income, and placed it in the category of an insurance company—more truly an insurance company than the taxpayer in **United States of America v. Home Title Insurance Company**, for petitioner does not, as did the taxpayer in that case, issue any titles insuring collectibility of the mortgage debt.

The vice in the holding of the Circuit Court of Appeals is the fact that it treated investment income as non-insurance income, which stripped petitioner of the characteristics of an insurance company, whereas this Court treated investment income as insurance income, which added to the characteristics of the taxpayer as an insurance company. Moreover, as was pointed out by this Court, rents are specifically included in investment income by the statute itself. It is necessarily true that an insur-

ance company may have investment income without losing its character as an insurance company. As in this case, so in every case, there must be something to guarantee the collectibility of the policies, otherwise they are valueless. True, a case may be imagined where an unneeded investment, producing a so-called investment income, was so great and so disproportionate to the necessities of the case that the term "insurance company" as applied to the taxpayer would be a mere disguise for some other kind of business. This is not true in the case at bar because the Findings of Fact expressly show that petitioner's investment was not excessive, but was meagre and, for a time, insufficient. Moreover, when net income is considered, that from investments was nil and that from premiums and incidental insurance business constituted practically the entire income.

If the investment and the income derived therefrom are properly proportioned to the business and the risk incurred, it would seem necessarily to follow that the fact that this investment income at times exceeded premium income would be immaterial. Indeed, since this Court has held that investment income is as characteristic of an insurance company as premium income, it would seem that a comparison between the two classes of income is entirely unnecessary.

If the comparison be made, it cannot be determinative of the character of a taxpayer's business. If it were, the taxpayer would have a protean business. In years in which the business of writing insurance was good and returns from investments were lean, it would be an insurance company. In years where, as a result of conditions beyond its control, premiums fell and investment income rose, it would cease to be an insurance company. Moreover, no company formed for the sole purpose of doing an insurance business, and with assets including an invest-

ment account perfectly proportioned from the beginning for that business, could initially be an insurance company. Premiums would have to be built up, whereas its investment income derived from investments made from paid in capital and surplus would begin ab initio in amounts probably larger than the premiums produced during the growing period.

CONCLUSION.

The general test is "the character of the business actually done." As to this the Circuit Court of Appeals agrees with this Court.

Specific tests are the active business done and the source of the taxpayer's income. In applying these specific tests both premiums and investment income (including rents) are held by this Court to be strictly insurance income. Premiums only are held by the Circuit Court of Appeals to be insurance income, and investment income is otherwise allocated.

In so holding the Circuit Court of Appeals not only reached an incorrect conclusion in this case, but wrote a gloss upon the opinions of this Court in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, which, unless corrected, will not only be confusing, but will adopt a rule entirely inconsistent with the rule adopted by this Court.

Thus it is the Circuit Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 514

COMMERCE TITLE GUARANTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the District Court (R. 45–56) is reported in 32 F. Supp. 73. The Circuit Court of Appeals did not render an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 6, 1941 (R. 169). The petition for a writ of certiorari was filed August 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a title guaranty company which derives more than half its gross income by renting space in

an office building owned and operated by it as authorized in its charter, and less than one fifth of its gross income from premiums on insurance policies issued by it, is an "insurance company" exempt from the capital stock tax under section 105 (c) of the Revenue Act of 1935, as amended.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 8–9.

STATEMENT

The material facts as found by the District Court may be summarized as follows:

Petitioner was incorporated under the laws of Tennessee in 1934 as a consequence of the liquidation of the Bank of Commerce & Trust Company (R. 32, 35). Its charter authorized it to make abstracts of title to real estate, guarantee titles, and to acquire, own, and operate office buildings or other real estate (R. 33). Its initial assets, all of which were received from the Bank, consisted of a fifteen-story office building called the Commerce Title Building, all the stock ($100,000 par value) of an abstract company, and all the title records formerly owned and used by the Title Department of the Bank (R. 34). The organizers of petitioner considered that it was necessary to acquire the office building in order to recapture the title guaranty business formerly enjoyed by the Bank and in order to carry on a successful title insurance business (R. 41, 47–48).

During the tax years ending June 30, 1936, and June 30, 1937, petitioner engaged in three general types of activity, namely, the insurance of titles to real estate; the title abstract business; and the operation of the office building, most of the second floor of which was occupied by petitioner, the other floors being leased to other tenants (R. 33, 52). The title policies issued by petitioner consisted of those insuring purchasers of real estate against defects in the title thereto, and of those insuring mortgagees against defects in the title to real estate securing the mortgage debt (R. 34). Before issuing any policies petitioner obtained a certificate from the Insurance Commissioner of the State of Tennessee licensing it to conduct the business of title insurance, and has since furnished reports to, and been examined by, the Insurance Commissioner and has annually received certificates from the Commissioner authorizing it to conduct such business (R. 33).

From its three types of activity above mentioned petitioner derived income in the following proportions during the calendar years 1935–1937 (R. 39–40, 50–51):

	1935	1936	1937
	Percent	*Percent*	*Percent*
Title department	24.63	28.89	18.15
Abstract department	.....	12.96	23.61
Office building	75.37	58.15	58.24
	100.00	100.00	100.00

Substantial portions of its 1935 and 1936 income attributed to "Title Department" were derived from sources other than premiums, especially from dividends. Less than one-fifth of petitioner's total income was derived from premiums in either of those years or in 1937 (R. 39–40, 50–51). Its income attributed to "Abstract Department" and "Office Building" for each of the years was derived from fees and rents, respectively (*id.*).

In its returns for the taxable years petitioner sought exemption from the capital stock tax under section 105 of the Revenue Act of 1935, as amended, on the ground that it was an insurance company (R. 6, 18, 29, 31). Its requests for exemption having been rejected, it paid the taxes and brought this suit for refund (R. 6–7, 18–19, 29, 31). The District Court gave judgment for the defendant, holding that the petitioner was not an insurance company because its principal business was operating an office building rather than insuring real estate titles (R. 55, 56). The Circuit Court of Appeals affirmed (R. 169).

ARGUMENT

The courts below correctly held that petitioner should not be classified as an "insurance company" within the meaning of section 105 (c). Since petitioner claims an exemption by virtue of being within that specially excepted class, it "must be held liable for the capital stock tax unless clearly

shown to have been an insurance company within the meaning of the Act." *Bowers* v. *Lawyers Mortgage Co.,* 285 U. S. 182, at 187; *United States* v. *Home Title Co.,* 285 U. S. 191, 195.

No such showing has been made. On the contrary, the facts found by the District Court and not disputed by petitioner disclose that the major portion of petitioner's gross income during the years in question was derived from its operation of the office building (R. 39–40, 54–55). Even including all the income from the abstract department, which may or may not be allocable to petitioner's insurance activities, less than 42% of petitioner's total income was realized from the insurance business (*id.*). Cf. *Empire Title & Guarantee Co.* v. *United States,* 101 F. (2d) 69, 72 (C. C. A. 2). Accordingly, under the decisions in the *Lawyers Mortgage Company* and *Home Title Company* cases, *supra,* it could not be said that petitioner's "principal business" was insurance.

Petitioner asserts (Pet. 8–10, 13, 22) that a conflict exists between the decision of the court below and the decisions of this Court in the *Lawyers Mortgage Company* and *Home Title Company* cases in that the court below, in adopting the grounds of the decision of the District Court, held that the amount of income derived from premiums was determinative, whereas this Court applied the test of "the character of the business actually done

in the tax years," 285 U. S. at 188.[1] However, as is clear from the opinion of the District Court, the court below did not treat the amount of premiums as decisive, but, expressly applying the principles established by this Court, looked to the proportionate income realized from petitioner's various activities and concluded from those figures that "operating an office building and *not* insuring real estate titles was petitioner's principal business" (R. 54–55).

Petitioner apparently contends (Pet. 9–10, 20–21) that the income derived from the operation of the office building should have been treated as investment income allocable to its insurance business. But the operation of the office building, unlike the examinations, appraisals, and other services treated as incidental to the conduct of the insurance business in the *Home Title Company* case, cannot reasonably be subordinated to petitioner's insurance activity. This seems especially clear in view of the fact that less than 20% of petitioner's income was derived from premiums (R. 39–40). It would be extraordinary for an insurance company

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[1] The Court held in the *Lawyers Mortgage Company* case that the taxpayer was not an insurance company so as to be exempt from the capital stock tax under a provision of the Revenue Act of 1921 virtually identical with that herein. In the *Home Title Company* case the Court held that the taxpayer was within the exemption, 75% of its income having been derived from insurance of titles and guaranties of mortgages and from services incident thereto.

to realize premium income in an amount less than the income from other sources. Even life insurance companies, which may be expected to realize a greater proportion of their income from investments than do other types of insurance companies, receive substantially more income from premiums than from investments. See Hearings before the Temporary National Economic Committee (1940), Part 10–A, pp. 6, 7.

CONCLUSION

The decision below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(c) The taxes imposed by this section shall not apply—

(1) to any corporation enumerated in section 101 of the Revenue Act of 1934, as amended;

(2) to any insurance company subject to the tax imposed by section 201, 204 or 207 of such Act, as amended.

* * * * *

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.

(a) *Imposition of Tax.*—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company, 13¾ per centum of the amount of its net income in excess of the credit provided in subsection (f) of this section;

* * * * *

(b) *Definition of Income, etc.*—In the case of an insurance company subject to the tax imposed by this section—

(1) *Gross Income.* — "Gross income" means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, * * *

* * * * *

(3) *Investment Income.* — "Investment income" means the gross amount of income earned during the taxable year from interest, dividends, and rents, computed as follows:

* * * * *

(U. S. C., Title 26, Sec. 204.)

Section 401 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, amended Section 105 of the 1935 Act by changing the rate of tax from $1.40 per $1,000 to $1 per $1,000 of the adjusted declared value and by changing the reference in Subsection (c) to the 1936 Act rather than to the 1934 Act.

Section 204 of the Revenue Act of 1936 is substantially the same as Section 204 of the Revenue Act of 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1941